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Paper No. 22
EJS

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Sunrider Corporation, dba Sunrider International

Serial No. 75/218,404

Mavis Gallenson of Ladas & Parry for The Sunrider Corporation, dba Sunrider International.

Patricia M. Evanko,¹ Senior Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Seeherman, Wendel and Rogers, Administrative Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

The Sunrider Corporation, dba Sunrider International, has appealed from the final refusal of the Trademark Examining Attorney to register SR as a trademark for the following goods:

Astringents for health purposes; food supplements; nutritional supplements, namely, health bars; herbal powders;

¹ Ms. Evanko initially examined the application, but the file was subsequently transferred twice to other Examining Attorneys. Ms. Evanko prepared the Examining Attorney's brief.

vitamins, herbal supplements and mineral supplements in all forms including tablets, capsules, liquids and powder; dietary food supplements; dietary supplements; fiber supplements; nutritional powder; teas for health purposes; nutritional supplements, namely acidophilus; herb food concentrates for health purposes; mouth drop supplements for health purposes; nutritional fiber bars for health purposes; chlorophyll electrolyte drinks; bee pollen for nutritional uses; and alfalfa for nutritional uses; all for health purposes.²

Registration has been finally refused pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive of the identified goods. The Examining Attorney contends that the letters SR are an abbreviation commonly used in the medical field to refer to a "sustained release" version of a product, and that applicant's mark, if used with its identified goods, would describe a significant feature of the goods, namely, that they have sustained release effects.

Applicant and the Examining Attorney have filed appeal briefs, and applicant has filed a reply brief.³ It is noted

² Application Serial No. 75/218,404, filed December 24, 1998, and asserting a bona fide intention to use the mark in commerce. The application as originally filed also included goods in Classes 29 and 30, but these classes were subsequently divided out of the application.

³ In its reply brief, in the last paragraph on page 2, applicant states that it "shall forward further authorities under separate

that with its reply brief applicant has submitted additional evidence. Trademark Rule 2.142(d) provides that the record in the application should be complete prior to the filing of an appeal, and that if, after an appeal is filed, the applicant or the Examining Attorney wishes to introduce additional evidence, a request may be filed with the Board to remand the application for further examination. Because applicant did not comply with the rule, the additional evidence submitted with the reply brief has not been considered. However, we have taken judicial notice of the listings from the 1997 edition of

cover to support this point." On April 6, 2001, (with a certificate of mailing dated April 3), almost one month after the filing of its reply brief on March 9, 2001, (with a certificate of mailing dated March 5), applicant filed a "supplemental brief" which includes argument and evidence. This filing is not authorized by the rules, nor did applicant seek leave to file it. Accordingly, the supplemental brief has not been considered.

We further point out that, even if leave had been sought, it would not have been granted. Trademark Rule 2.142(b)(1) provides that the applicant may file a reply brief within 20 days from the date of mailing of the Examining Attorney's brief. The Examining Attorney's brief was mailed on December 19, 2000, and on January 10, 2001, with a certificate of mailing dated January 5, applicant requested a 60-day extension of time to file it, stating that counsel had not had an opportunity to confer with applicant due to the Christmas season. The Board granted the request, and allowed applicant until March 5 to file its reply brief. Thus, even without the difficulties caused by the Christmas season, applicant was granted three times the normal period allowed for filing a reply brief. Applicant has given no reason why it could not submit all its arguments with its reply brief, which we note is five pages long. As for the evidence attached to the supplemental brief, this is manifestly untimely, for the same reasons discussed in our opinion in regard to evidence submitted with applicant's reply brief.

the Acronyms, Initialisms & Abbreviations Dictionary which applicant submitted with its appeal brief.⁴

An oral hearing was not requested.

A term is merely descriptive, and therefore unregistrable under Section 2(e)(1), if it immediately conveys knowledge of the ingredients, qualities, or characteristics of the goods with which it is used. **In re Gyulay**, 820 F.2d 1216 (Fed. Cir. 1987). The question of whether a particular term is merely descriptive is not decided in a vacuum, but in relation to the goods on which, or the services in connection with which, it is used. **In re Venture Lending Associates**, 226 USPQ 285 (TTAB 1985). See also, **In re Abcor Development Corporation**, 588 F.2d 811, 200 USPQ 215 (CCPA 1978).

The Examining Attorney has submitted dictionary evidence⁵ that SR is an acronym for "sustained release" and that the public has been exposed to the use of this acronym in connection with various pharmaceutical products, as shown by excerpts of articles taken from the NEXIS data base, including the following:

⁴ The Board may take judicial notice of dictionary definitions. **University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.**, 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁵ Acronyms, Initialisms & Abbreviations Dictionary, 18th ed., 1994.

The sustained release formulation, Wellbutrin SR, introduced in 1996, boosted sales of bupropion beyond \$200 million in 1997 alone.

"The Herald-Sun," (Durham, NC) May 19, 1999

Ritalin pills come in a range of chalky colors according to their strength: lemon yellow for 5 milligrams, pale green for 10, light yellow for 20, and white for 20-SR or "sustained release." "Chicago Tribune," February 14, 1999

The drug, which is also sold as an antidepressant called Wellbutrin SR (the initials stand for sustained release) lessens the desire to smoke... "Money," January 1999

The company spent 12 years and \$17 million developing Procan SR, a sustained-release drug used to treat heart rhythm irregularities.

"The Record," (Bergen County, NJ) September 6, 1998

The sustained-release form of Wellbutrin—known as Wellbutrin SR—was introduced in late 1996 and boosted that drug's sales from \$126.3 million to more than \$200 million last year.

"The Herald-Sun," (Durham, NC) April 22, 1998

The effects of the sustained-release version of Ritalin, called Ritalin-SR, take place much slower and less dramatically...

"The Detroit News," March 8, 1998

Try another type of anti-depressant. Wellbutrin-SR (sustained release) and Serzone seem to have a lower incidence of sexual dysfunction...

"Milwaukee Journal Sentinel," September 22, 1997

Applicant does not dispute that SR is an abbreviation for sustained release. However, applicant argues that the NEXIS articles all refer to prescription drugs rather than the goods for which applicant seeks registration, and therefore the Examining Attorney has not shown that "sustained release" is a characteristic of the applied-for goods. Applicant states that its mark "is being used in connection with various health products, including drinks, powders and supplements, none of which contains, or are advertised by Applicant to contain, 'sustained release' capabilities." Brief, p. 9-10.

Subsequently the Examining Attorney submitted evidence⁶ that certain of the goods identified in the application, albeit not the drinks, powder and supplements, are items which may have sustained release.⁷ The evidence includes

⁶ After the filing of applicant's appeal brief the Examining Attorney requested remand of the application to make additional evidence of record. Because the Examining Attorney showed good cause for the request, in that she was newly assigned to the application, the Board granted the request for remand.

⁷ The Examining Attorney pointed out, in her brief, that because applicant specifically did not discuss its vitamins, the refusal on the basis of mere descriptiveness was appropriate because the mark was descriptive of, at the very least, vitamins. The Examining Attorney stated that if applicant had asserted that none of its goods, including vitamins, had sustained release, the mark would have been refused as deceptively misdescriptive.

It should be noted that, after the Examining Attorney's Office Action on remand, applicant was given an opportunity to file a supplemental appeal brief, and chose not to do so.

the following NEXIS references:

"The two cornerstone supplements for me are a high-quality sustained-release daily multiple vitamin and mineral combination, and garlic..."
"Austin American-Statesman,"
January 29, 1999

Niacin can lower your blood cholesterol and perhaps help ward off heart disease. You don't need a prescription to get it... "Nobody should take sustained-release niacin unless a physician is following them carefully..."
"Orlando Sentinel Tribune," August 2, 1990

But the highest potency vitamin made today is still produced by his company, Chalpin added. The sustained-release vitamin, call Ultimate Plus...
"Arizona Business Gazette," May 25, 1990

On another occasion I became panic stricken when I saw that I was out of Vitamin E sustained-release capsules and the health food store was closed for the night.
"Los Angeles Times," January 24, 1986

The Examining Attorney also made of record excerpts from "shopping" websites offering "Sustained Release B Complex Tablets", "Sustained Release Buffered C Tablets", "Sustained Release Multi Vits & Mins Tablets";⁸ "Super C Complex Sustained Release", "Shot-O-B-12 5000 mcg Sustained Release" (B-12), "Ultra-Two Sustained Release"

⁸ www.sofcom.com.

(multivitamin and mineral formula);⁹ and melatonin ("1.5 milligram, sustained release").¹⁰ In addition, the website for the Zenith Nutritional System¹¹ states that "Sustained-releasing vitamins also increase the percentage of the vitamin absorbed. ...We find in ZENITH a unique system of sustained-releasing the water-soluble vitamins. ZENITH's unique vegetable oil sustained-release system allows these nutrients to be released slowly in the stomach and small intestine, and evenly over a 4 to 8 hour period. This provides maximum absorption and utilization. Other systems of sustained-release may not work as well."

We find that the evidence amply demonstrates that sustained-release is a characteristic of at least some of the goods identified in applicant's application, namely, vitamins and mineral supplements. Moreover, the evidence also shows that the consuming public would regard SR as an acronym for "sustained-release," such that the term SR would immediately and directly convey to such purchasers information about a characteristic of the goods, i.e., that they are sustained-release products. Although we agree with applicant that the NEXIS evidence shows SR used in connection with medications, the distinction between these

⁹ vitaclick.com, offering Nature's Plus products.

¹⁰ www.webadprod.com, advertising WorldWide Labs products.

goods and those of applicant is really a legal one, having to do with whether or not they are regulated by the Food and Drug Administration. On a practical level, consumers would view both drugs and applicant's identified goods as products used to maintain or improve health. Because of their familiarity with SR for widely disseminated pharmaceutical products such as Ritalin (a drug for hyper-active children) and Wellbutrin (an antidepressant), consumers, seeing SR on vitamins and the like, would immediately recognize the term to indicate that they are sustained-release products.

In reaching this conclusion, we have considered applicant's argument that SR has a number of meanings, as shown by the large number of listings for this term in the acronyms dictionary. However, as noted previously, the determination of whether a term conveys a particular meaning is decided not in the abstract, but in relation to the goods on which the term is used. Thus, the fact that, for example, SR means Stripe Rot, Sinus Rhythm or Search and Rescue, does not take away from its connotation of "sustained release" when used with vitamins. Nor are consumers likely to ascribe the meanings applicant has

¹¹ www.zenith4theplanet.com.

suggested: Starting Relay, Stomach Rumble, Stoichiometric Ratio, Strontium, Steroid Receptor and Systemic Resistance. Because of the newspaper articles publicizing that SR is used to describe sustained-release pharmaceutical products, and the fact that sustained-release is a selling point for vitamins and minerals, we have no doubt that consumers will understand SR, if used on applicant's identified goods, as referring to the sustained-release characteristic of the vitamins and minerals.

We would also point out that the present situation differs from **In re WSI Corporation**, 1 USPQ2d 1570 (TTAB 1986), in that the record herein consists not only of the acronyms dictionary, but of substantial NEXIS evidence showing that SR has been used, in articles in newspapers and periodicals in general circulation, to mean "sustained release."

We have also considered applicant's argument that the mark was intended to be an abbreviation of its house mark, SUNRIDER, and its trade name, The Sunrider Corporation. Whatever applicant's intention may be, it has applied for the mark as simply the typed letters SR. If a registration were to issue to applicant for this mark, it would be free to use SR without the word Sunrider, such that consumers would view it as a descriptive term for its sustained

release products.¹² Obviously if applicant had the exclusive right to use SR for goods such as vitamins, it would have a negative impact on competition. (Section 7 of the Trademark Act, 15 U.S.C. 1057, provides that a certificate of registration of a mark upon the Principal Register is prima facie evidence of the registrant's exclusive right to use the registered mark in commerce on the goods specified in the certificate.)

Finally, applicant attempts to draw an analogy to case law involving surname refusals in order to show that its mark is not merely descriptive. Suffice it to say that we do not regard the evidence herein as showing mere "sporadic and/or coincidental use." Rather, the evidence unequivocally demonstrates that there has been widespread public exposure to SR as meaning "sustained release" with respect to pharmaceutical products. Further, as noted above, the evidence shows that certain of applicant's

¹² Applicant has also stated, at p. 3 of its reply brief, that its goods will only be sold by its distributors on a one-to-one basis, that its buyers are educated people who have to "take the trouble to seek out SR products for purchase," and that its products are priced at a premium and thus not meant for the mass market. However, even if such facts would have some effect on our determination of descriptiveness (and we fail to see how the fact that its consumers may be educated or purchasers of premium products would detract from their viewing SR as meaning sustained release, since educated people would be more likely to understand what SR means), applicant has not limited its identification to particular trade channels or classes or consumers.

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goods, including vitamins, are products which can be sold in a sustained-release formulation. As a result, consumers will immediately understand, when they see SR in connection with vitamins and the like, that a characteristic of the goods is that they are sustained-release products.

Accordingly, we find that SR is merely descriptive of such goods. Further, registration is properly refused if the applied-for mark is descriptive of any of the goods for which registration is sought. **In re Analog Devices Inc.**, 6 USPQ2d 1808 (TTAB 1988), *aff'd.* unpub. op. 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989); **In re Canron, Inc.**, 219 USPQ 820 (TTAB 1983).

Decision: The refusal of registration is affirmed.